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VIA ECF

February 25, 2022

Hon. Sarah Netburn
United States Magistrate Judge
Southern District of New York
40 Foley Square
New York, NY 10007

RE: *SEC v. Ripple Labs Inc. et al.*, No. 20-cv-10832 (AT)(SN) (S.D.N.Y.)

Dear Judge Netburn:

Defendants Ripple Labs Inc., Bradley Garlinghouse and Christian Larsen ("Defendants") respectfully submit this opposition to the SEC's Motion for Partial Reconsideration and Clarification of the Court's January 13, 2022 Order (ECF No. 429) ("Motion").

The SEC's Motion is an inappropriate attempt at a do-over simply because it is unhappy with the Court's order on its prior briefing. The SEC makes no pretense that the demanding standard for reconsideration is satisfied here. Instead, it seeks to yet again brief an issue that has been extensively litigated for nearly a year, but this time based on a new theory, in a reversal-of-course. Ignoring its prior briefing and a sworn declaration it procured from Former Director of Corporation Finance William Hinman—in which the SEC maintained that Mr. Hinman's Speech ("Speech") simply expressed the "personal views" of the speaker (a position the SEC now knows cannot support its privilege claim)—the SEC now argues for the first time that the Speech was the culmination of and reflected a policy process within the Division of Corporation Finance ("Corp Fin"). This reversal contradicts Mr. Hinman's sworn statement, Ex. A, at ¶ 13 ("Hinman Declaration"). Likewise, with neither permission nor apology, the SEC submits a brand-new 5-page declaration—in blatant violation of the local rules—from someone who has no first-hand knowledge of the matters attested to. *Compare* ECF No. 429-7 *with* Local Civ. R. 6.3 ("No

affidavits shall be filed by any party unless directed by the Court.").

And for all its tactics, the SEC ultimately fails to establish that this Court's January 13, 2022 Order was in error. The SEC cannot show that the Court overlooked any factual matters before it: the Court considered and credited both Mr. Hinman's sworn statements and the SEC's representations that the Speech expressed Mr. Hinman's "personal views." ECF No. 413 at 14 ("Order"). Moreover, the Court already recognized that SEC staff were involved in discussions around the Speech and determined that those discussions were "merely peripheral" to actual policy-making. Order at 14–15 (quoting *Tigue v. U.S. Dep't of Just.*, 312 F.3d 70, 80 (2d Cir. 2002)). Additional discussion (presumably contained within the SEC's self-selected documents) does not alter the analysis. The DPP still would not attach because those communications were not an "essential link" in a "specific consultative process." *Id.* (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999)). At most, given that the discussions apparently all concern what should be said in the Speech itself, they were "merely peripheral to actual policy formation." *Id.* Finally, the SEC's protean approach to litigating this issue only underscores why the Speech drafts and related communications are important and highly relevant for purposes of discovery to which Defendants are in any event entitled.

1. The Motion Should Be Denied Because The SEC Identifies No Controlling Law Or Facts That The Court Overlooked.

"[T]o be entitled to reargument and reconsideration, the movant must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion." *SEC v. Rio Tinto PLC*, 2021 WL 818745, at *2 (S.D.N.Y. Mar. 3, 2021) (Torres, J.) (quoting *Dietrich v. Bauer*, 198 F.R.D. 397, 399 (S.D.N.Y. 2001)). "[R]econsideration is generally denied unless 'the moving party can point to controlling decisions or data that the court overlooked.'" *In re Terrorist Attacks on Sept. 11, 2001*, 2020 WL 5848990, at *2 (S.D.N.Y. Sept. 20, 2020) (Netburn, J.) (citation omitted).[1]

[1] "[T]he purpose of the local rule confining reconsideration to matters 'overlooked' and barring the submission of affidavits unless authorized by the courts is to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *In re CRM Holdings, Ltd. Sec. Litig.*, 2013 WL 787970, at *3 (S.D.N.Y. Mar. 4, 2013) (internal citation omitted).

The SEC does not contend that the Court failed to consider any relevant legal authority, controlling or otherwise. It cites no cases in its Motion that previously have not been considered by the Court. *See* Order at 13 (citing, *e.g.*, *Nat. Res. Def. Council v. EPA*, 19 F.4th 177, 185 (2d Cir. 2021) ("*NRDC*")).

As for "factual matters," the SEC contends that the Court "did not consider two significant matters," namely that "Director Hinman made the Speech in order to communicate Corp Fin's approach on the regulation of digital asset offerings," and "the speech was the end product of significant collaboration by many staffers across the agency[.]" Mot. at 3. But the SEC offers no evidence that the Court did not consider the latter, and, as to the former, the Court could hardly have "considered" matters that the SEC never previously argued—and, indeed, as to which the only evidence it presented was *contrary* to the position it now takes.

In its briefing regarding Entry 9—the June 5, 2018 email attaching a draft of the Speech—the SEC previously argued, *in full*:

> Entry 9 consists of an email enclosing a draft of the Hinman Speech for review and comment by SEC officials, including the directors of various SEC offices and divisions and the then-Chair of the SEC. The draft speech and corresponding email are predecisional and deliberative, as Director Hinman was seeking feedback from other SEC personnel about the speech's contents prior to its delivery. The email [**REDACTED**]. As such, the staff was deliberating on what the speech should say, and no final decision had been reached about its contents. Such drafts and related emails are protected by the DPP.

ECF No. 351 at 13. The SEC never argued that the Speech "communicate[d] Corp Fin's" views. To the contrary, the SEC argued that the Speech "expressed [Mr. Hinman's] *own* view." ECF No. 255 at 3. And that has been the SEC's consistent position—both in this case and in other litigation where the issue has recently come up. *See* Ex. B, SEC Mot. to Quash, *SEC v. LBRY, Inc.*, No. 21 cv-00260 (D.N.H. Nov. 5, 2021), Dkt. No. 37 ("*LBRY* Mot. to Quash") (characterizing the Speech as "Director Hinman's personal views").

The Court did not overlook the SEC's argument: it specifically credited the SEC's representation. Order at 14 (describing Speech as reflecting Mr. Hinman's "personal views") (quoting Hinman Decl., Ex. A)). Likewise, the SEC did not argue that the exchange of drafts was part of any broader policy process; it said the topic of any deliberations was "*what the speech should say*." ECF No. 351 at 13 (emphasis added). The Court credited that representation too.

Order at 13–14. The SEC cannot manufacture an "overlooked" fact by contradicting its own prior representations. *See Wilder v. News Corp.*, 2016 WL 5231819, at *5 (S.D.N.Y. Sept. 21, 2016) ("[A] reconsideration motion cannot be used as a vehicle to make new arguments that contradict or are inconsistent with a party's earlier submission.").

The SEC's argument that the Court erred when it "based its decision on a single document relating to the Speech—one that *Defendants* chose to highlight for the Court," Mot. at 1 (emphasis in original), is meritless. It also ignores that Defendants could not have cherry-picked a document that was *withheld* from them. The SEC did not submit other documents for the Court to consider. It did, however, describe documents other than Entry 9 relating to the Speech in its briefing. ECF No. 351 at 14 n.11. The SEC offers no reason to believe the Court did not consider the SEC's briefing.

Nor could the Court have "overlooked" the 10 documents that the SEC submits in support of its Motion, as those materials were never previously put before the Court. "A motion for reconsideration is 'not intended as a vehicle for a party dissatisfied with the Court's ruling to advance new theories that the movant failed to advance in connection with the underlying motion.'" *Rio Tinto*, 2021 WL 818745, at *2 (quoting *WestLB AG v. BAC Fla. Bank*, 912 F. Supp. 2d 86, 95 (S.D.N.Y. 2012)); *Polsby v. St. Martin's Press, Inc.*, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) ("[T]he court's initial decision [is not] the opening of a dialogue in which that party may then use such a [reconsideration] motion to advance new theories or adduce new evidence in response to the court's rulings.") (citation omitted). As for the unauthorized Hardy declaration, it should be struck from the record. *See, e.g.*, *Fid. Info. Servs., Inc. v. Debtdomain GLMS PTE Ltd.*, 2010 WL 3469910, at *1 (S.D.N.Y. Aug. 24, 2010) (finding the appropriate remedy for submission of unauthorized affidavit on motion for reconsideration is to strike and disregard it).

2. The SEC's Reversal of Position Does Not Justify Reconsideration.

Throughout its briefing and through Mr. Hinman's sworn testimony, the SEC has taken the position that the Speech reflected only Mr. Hinman's personal opinion, not an official policy position of the SEC or of any other members of the SEC staff. Mr. Hinman's Declaration emphasized the disclaimer at the beginning of his speech that "[m]y remarks are mine alone," and

the written disclaimer that his Speech "expresses the author's views," and went on to say "[t]he speech was intended to express *my own personal views*." Ex. A, Hinman Decl. ¶¶ 11, 13 (emphasis added). When he was deposed in this case, Mr. Hinman testified that he believed his Speech "provided clarity as to how *I* was looking at these issues." Ex. C, Hinman Dep. Tr. 132:9–10 (emphasis supplied); *see also id.* at 233:14–15 ("The speech reflects my thoughts. I am comfortable that the speech reflects my thinking."); 233:19–20 (testifying that the statements in the speech "are intended to be a speech of my thoughts in the space."); 125:4–9 (confirming he did not give the speech as part of his duties as Director of Corp Fin). The SEC now seems to suggest that Mr. Hinman's sworn declaration and deposition testimony were at least misleading, arguing that the Speech all along reflected not only Mr. Hinman's personal opinion but also "represent[ed] the view of th[e] division," Mot. at 6 (quoting 17 C.F.R. § 202.1(d)). This reversal effectively repudiates the SEC's prior litigation position in this case. *See* Order at 14 (citing SEC submissions).

In support of its new position on the import of the Speech, the SEC seeks to dismiss the Speech's disclaimer as merely a "standard disclaimer," as if to suggest its substance should be ignored. Mot. at 5–6. This directly contradicts the SEC's prior reliance on that same disclaimer when it moved to strike Ripple's fair notice defense. *See* ECF No. 132 at 20 (arguing that the Speech "could have no bearing on whether the SEC provided fair notice" because it was "the speech of an SEC employee rather than the SEC itself (that is, a majority of the Commissioners), *as a disclaimer in the speech made clear*") (emphasis added). The SEC's argument also ignores that, according to his declaration, Mr. Hinman underscored the "standard disclaimer" when he delivered the speech, emphasizing that "My remarks are mine alone, not necessarily those of the Commission, the Commissioners, *or the staff*." Ex. A, Hinman Decl. ¶ 11 (emphasis supplied). The standard disclaimer was included when the Speech was published, and it is required when employees of the Agency engage in "*Outside* employment and activities," like "teaching, lecturing, and writing activities." 17 C.F.R. § 200.735-4 (emphasis added). It is required precisely because, while the SEC's Office of General Counsel reviews speeches to ensure compliance with the SEC's ethical rules, that review does "not involve adoption of, or concurrence in, the views expressed"

by the agency itself. *Id.* The SEC's argument contradicts its recent representation in other litigation that the particular disclaimer in Mr. Hinman's Speech is "an important, and unambiguous, disclaimer," Ex. B, *LBRY* Mot. to Quash, at 4, not meaningless boilerplate.

As a matter of basic fairness, having taken and maintained the position that Mr. Hinman's speech reflected only his "personal views," the SEC cannot be permitted to backtrack to avoid the natural consequences of its own litigation strategy. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . .").

But even on the merits, the SEC's new position does not warrant reconsideration. The SEC cites to 17 C.F.R. § 202.1(d) for the proposition that "any statement by the director" of an SEC Division "can be relied upon as representing the views of that division," Mot. at 6. That SEC regulation refers to the SEC's rules governing "informal procedures" pursuant to which the Commission's staff provides "advice and assistance … to members of the public dealing with the Commission." This includes, for example, interpretive and no-action letters published by SEC divisions—including Corp Fin—on their respective websites. *See* Div. of Corp. Fin. No-Action, Interpretive and Exemptive Letters, SEC (Dec. 20, 2021), https://www.sec.gov/corpfin/corpfin-no-action-letters. It does not extend to speeches that reflect only an individual's "own personal views." Notably, unlike Mr. Hinman's Speech, guidance issued under the SEC's informal procedures does *not* contain disclaimers that it reflects only the personal views of the author. Nor does Rule 202.1(d) signify that every utterance of a Division Director is the view of the Division—particularly when the Director himself says in the very statement that it is not. Nothing in Rule 202.1(d) provides a basis for reconsideration here.

3. Communications About Mr. Hinman's Speech Are Not "Essential Links" in a Policymaking Process.

That Mr. Hinman consulted with other staff at the SEC in coming to his "personal views" and deciding what to say in his Speech was neither overlooked by the Court, *see* Order at 14–15, nor does it transform such discussions into "pre-decisional" communications protected by the DPP. While Defendants lack access to the 10 new documents submitted by the SEC, the picture painted

by the SEC's own description of those documents is one that is entirely consistent with what the SEC previously told the Court and the Court credited: that Mr. Hinman communicated with SEC staff about "what the speech should say." ECF No. 351 at 13; *see also* Order at 13–14. But no matter how extensive those communications were, they do not change the fundamental character of the *process* of which they were a part: the SEC told the Court in prior briefing that the process in question concerned what to say in a speech communicating his "personal views," not whether the agency for which Mr. Hinman worked should adopt any particular rule or policy.

The SEC seems to argue the Speech should fall within an administrative twilight zone—somewhere between a "personal view" and "agency policy." It argues for the first time that communications about the contents of the Speech were in fact an "essential link" in a process that led to issuance of Staff guidance by the Strategic Hub For Innovation and Financial Technology ("FINHub") nearly a year later, in April 2019 (the "Framework"). Mot. at 4–5. The SEC has never before argued that the discussions about what Mr. Hinman should include in his 2018 Speech were part of a process that led to the Framework. Even were it otherwise, the fact that SEC staff discussed with Mr. Hinman what he should say in a particular speech followed by the issuance of informal guidance by a distinct office within the SEC a year later, does not cloak the discussions about the Speech with a privilege. It instead renders them—as the Court rightly held—"peripheral to actual policy formation." Order at 14–15 (quoting *Tigue*, 312 F.3d at 80).

The SEC's arguments seem to equate the requirement that, to be privileged, a communication must "form[] an essential link in a specified consultative process," *Grand Cent. P'ship, Inc.*, 166 F.3d at 482, with a broader conception that any communications *relevant* to SEC policy are also privileged. Not so. To be *privileged*—and therefore stand as an exception to the rule that relevant evidence must be produced in discovery—the communications must be "prepared in order to assist an agency decisionmaker in arriving at his decision" as part of a "specified consultative process." *Id.*; *see also Toney-Dick v. Doar*, 2013 WL 5549921, at *1 (S.D.N.Y. Oct. 3, 2013) ("The deliberative process privilege does not provide a blanket basis upon which to withhold documents that an agency has created during its decision-making process. Indeed, if that were the case, the deliberative process privilege would provide an exemption from

the discovery rules for decision-making agencies generally—and that, of course, is not the law."). The SEC identifies no such "process" or "decision-making" and nothing the SEC submits suggests that the discussions with Mr. Hinman were part of such a process.

Contrary to the SEC's argument, Mot. at 9–10, Mr. Hinman's Speech is nothing like the deliberative communications held privileged in *NRDC*, 19 F.4th at 189. Rather, the communications at issue in *NRDC* concerned deliberations during the course of a formal policy-making process about how to communicate the policy, once adopted, to the public. *See* 19 F.4th at 185–86; *see also* ECF No. 405 (Defendants' response to the SEC's notice of supplemental authority on *NRDC*). Here, the SEC has disclaimed both that there has been any formal policy-making by the SEC (or, for that matter, Corp Fin) and that Mr. Hinman's Speech was a communication of such policy. *See* Mot. at 10.

4. Even If The DPP Applied, The Privilege Should Be Overcome On The Facts Of This Case And As A Consequence Of The SEC's Litigation Strategy.

Finally, even if it were a close call (and it is not), the Court should not permit the SEC to shield these documents from discovery in light of the SEC's shifting positions in this litigation—characterizing the speech as Mr. Hinman's "personal views" when it suits a particular litigation objective, then denying that the Speech is a reflection of SEC policy, *see* July 15, 2020 H'rg Tr. at 10:24–11:17, and finally pivoting to argue that, in fact, it actually reflects a *Division* policy process the SEC apparently identified only *after* the Court's ruling. "Neither the Federal Rules of Civil Procedure nor the Local Civil Rules permit any party to make its assertions of privilege a moving target." *SEC v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 166 (S.D.N.Y. 2014) (finding waiver). Defendants have been seeking discovery on this issue for more than a year, and the SEC may not, at the thirteenth hour, suddenly start over on a fresh theory of privilege.

Likewise, while the Court has already held that, in general, the factors bearing on piercing the qualified DPP weighed against disclosure, those factors would favor disclosure even more strongly with respect to the documents at issue here if the Court were to find them privileged. In a case where the SEC alleges that it was at least reckless for Mr. Garlinghouse and Mr. Larsen to fail to recognize Ripple's sales of XRP as an unlawful securities offering, it is highly probative and potentially exculpatory that those within the SEC itself—the plaintiff in this case—struggled

with the very same question, so much so that it took them 52 drafts to "get it right" in Mr. Hinman's Speech. Mot. at 10; *see also* Order at 19 (recognizing the relevance of the materials to the SEC's scienter allegations); ECF No. 289 at 4 (citing July 14, 2021 Public Statement from Commissioners Hester M. Peirce, Elad L. Roisman regarding *In the Matter of Coinschedule*, criticizing the lack of clarity from the SEC even today).

Moreover, the Court's analysis declining to overcome the privilege as to other materials, which turned heavily on the policy-based justification underpinnings of the DPP and the importance that the SEC "'get it right' on the highly consequential decision of how (or whether) to regulate digital assets, [and] the need to promote candor to improve agency decisionmaking," Order at 22, should not control the outcome for materials related to the Speech. The SEC's decision to charge Mr. Garlinghouse and Mr. Larsen individually in this case was exceptional, and distinguishes this case from virtually every other digital asset case the SEC has brought. *Cf. SEC v. Telegram Grp., Inc.*, No. 1:19-cv-09439 (S.D.N.Y.); *SEC v. Kik Interactive Inc.*, No. 1:19-cv-05244 (S.D.N.Y.). So does the fact that XRP was circulating globally (in the billions of transactions) for nearly eight years before the SEC filed this case against Ripple. The Defendants have a strong interest in accessing the evidence at issue, as it is likely to be exculpatory insofar as it shows uncertainty within the SEC itself and the SEC's awareness of market confusion, thereby undercutting the SEC's allegations that the status of digital assets like XRP under the securities laws was obvious. On the other hand, the SEC's interest in concealing the discussions about what Mr. Hinman should say in such a speech, while maintaining allegations it chose to bring that Mr. Garlinghouse and Mr. Larsen were each at least reckless, is necessarily diminished. This is not a run-of-the-mill enforcement matter, and the Court has already noted that this is a unique case that is distinguishable from others that may come, Order at 20–21; *see also* July 15, 2021 Hr'g Tr., at 40:4–8; Apr. 6, 2021 Hr'g Tr. at 52:22–23, as other courts have recognized, *see* Ex. D, Feb. 23, 2022 Hr'g Tr. at 20:17–21:2, SEC v. LBRY, No. 1:21-cv-00260-PB (D.N.H.) (quashing subpoena to Mr. Hinman, distinguishing the SEC's allegations in this case).

Finally, to the extent that the SEC relies on policy-based justifications to avoid disclosure of relevant evidence, its interests in doing so are also diminished by the SEC's apparent efforts to

make the legal effect of the Speech ambiguous and to maintain a degree of plausible deniability over the agency's responsibility for the views expressed in the Speech. If the SEC's new position is to be credited, then rather than announcing policy in a formal statement on which the public could rely, Mr. Hinman and others at the SEC decided to make this pronouncement at a private event, in a speech he expressly labeled as reflecting views that were Mr. Hinman's "alone" and not those of the staff or anyone else at the SEC. And to this day, the SEC continues to speak equivocally about the nature and effect of the Speech. For example, although Mr. Hinman's Speech makes clear that Ether—a digital asset similar in many respects to XRP—was *not* a security in 2018, ECF No. 429-1 at 4 ("[B]ased on my understanding of the present state of Ether . . . current offers and sales of Ether are not securities transactions."), the current Chair of the SEC has repeatedly declined to say the same—as recently as last month. *See, e.g.*, *SEC Chair Gensler on Potential Crypto Regulation*, CNBC (Jan. 10, 2022), cnbc.com/video/2022/01/10/sec-chair-gary-gensler-on-potential-crypto-regulation-its-within-the-securities-laws.html ("We don't get involved in these types of public forums talking about any one project, one possible circumstance or give legal advice over the airwaves that way."). The stakes of this litigation are simply too high to permit the SEC to stand on the DPP to avoid producing probative evidence while maintaining optionality as to whether the process at issue, and its culmination, reflect agency policy at all.

* * *

For these reasons, respectfully, the SEC's Motion should be denied.

/s/ Matthew C. Solomon
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Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	**20 Civ. 10832 (AT) (SN)**
	:	
- against -	:	**ECF Case**
	:	
RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN,	:	
	:	
Defendants.	:	

DECLARATION OF WILLIAM H. HINMAN
IN SUPPORT OF PLAINTIFF'S MOTION TO QUASH
DEFENDANTS' DEPOSITION SUBPOENA

I, William H. Hinman, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member of the New York bar.

2. On May 10, 2017, I was appointed by the then-Chairman of the Securities and Exchange Commission ("Commission") to serve as the Director of the Commission's Division of Corporation Finance (the "Division"). I served in that capacity until December 11, 2020.

3. In my role as Division Director, I was responsible for overseeing the work of approximately 400 Division staff, including attorneys, accountants, analysts and other employees located in Washington, D.C.

4. The Division supports the Commission's mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. The Division seeks to ensure that investors are provided with material information in order for them to make informed investment and voting decisions when companies offer and sell securities to the public, and on an ongoing basis as they continue to provide information to the public.

5. While I was Division Director, the staff of the Commission's Division of Enforcement conducted a non-public investigation into the activities of Ripple Labs, Inc. ("Ripple") and its current and former CEOs, Christian Larsen and Bradley Garlinghouse.

6. I am aware that, after I left the Commission on December 11, 2020, the Commission authorized the filing of a lawsuit against Ripple, Larsen and Garlinghouse arising out of the staff's investigation of their offers and sales of XRP ("Litigation") and that the Litigation was filed on December 22, 2020.

7. I have no first-hand knowledge of the facts underlying the Commission's claims in the Litigation. I did not participate directly or indirectly in any offers or sales of XRP, or directly or indirectly observe any offers and sales of XRP.

8. Anything I know about the facts alleged by the Commission in the Litigation, or which might support the Commission's claims, I learned from communications with the Division of Enforcement staff who conducted the investigation (or from Division staff who were assisting Enforcement staff in the investigation), meetings with representatives of Ripple, Larsen and Garlinghouse, and the written submissions of their legal counsel.

9. Between 2018 and 2020, I attended meetings with Commission staff and Ripple's employees and attorneys, which I understand were part of the Division of Enforcement's fact-gathering in connection with its investigation.

10. Between 2018 and 2020, I was also involved in a number of internal Commission meetings with attorneys from the Division of Enforcement regarding their investigation of Ripple, Larsen, and Garlinghouse. These meetings provided me with information from the Commission's investigation so that I could assist the Division of Enforcement in making decisions about its recommendations to the Commission.

11. On June 14, 2018, I delivered a public speech entitled "*Digital Asset Transactions: When Howey Met Gary (Plastic)*" (the "Speech"). I began the speech with the following disclaimer: "My remarks are mine alone, not necessarily those of the Commission, the Commissioners, or the staff." The text of the Speech, which is publically available on the Commission's website, contains a similar disclaimer: "The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner. This speech expresses the author's views and does not necessarily reflect those of the Commission, the Commissioners or other members of the staff."

12. I did not reference Ripple or its digital asset, XRP, in my remarks. Instead, my Speech expressed my view that "current offers and sales of Ether are not securities transactions." My view was "based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure."

13. The Speech was intended to express my own personal views. During my preparation of the Speech, I discussed my thoughts with other Commission employees, as part of the Commission's ongoing deliberations about whether offers and sales of Ether constituted securities transactions. To the best of my knowledge, the Commission had not taken at that time, and still has not taken, any position or expressed a view as to whether offers and sales of Ether constituted offers and sales of securities.

14. During my time with the Division, I did not discuss with anyone outside the Commission (other than Ripple's representatives and attorneys as part of the investigation that preceded the Litigation) the question of whether the offers and sales of XRP by Ripple, Larsen, or Garlinghouse constituted securities transactions. I did have discussions on this issue with Commissioners and Commission employees.

15. During my time with the Division, I did not discuss the Commission's investigation of Ripple, Larsen, and Garlinghouse or the legal status of offers and sales of XRP under the securities laws with anyone outside the Commission (other than with Ripple's representatives and attorneys).

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 23rd day of June, 2021, in Warrenton, Virginia.

William H. Hinman

Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. LBRY, INC., Defendant.	)	Civil Action No. 21-cv-00260

SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO QUASH DEPOSITION SUBPOENA ISSUED TO FORMER DIVISION OF CORPORATION FINANCE DIRECTOR WILLIAM HINMAN

Plaintiff Securities and Exchange Commission (the "Commission") submits this memorandum of law, the declaration of William Hinman ("Hinman Dec."), and various exhibits in support of its motion to quash the deposition subpoena issued by defendant LBRY, Inc. ("LBRY") to the former director of the Commission's Division of Corporation Finance ("Corp. Fin."), William Hinman ("Director Hinman"). LBRY's efforts to depose Director Hinman contravene the "well established" restrictions on deposing senior officials because Director Hinman is a top government official protected from discovery under the *Morgan* Doctrine. *See Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). Since 1941, the Supreme Court strongly discouraged the practice of calling high-ranking officials as witnesses, and the limitations and restrictions on deposing such witnesses are well-established in this circuit; specifically, LBRY must establish *extraordinary circumstances* to overcome the presumption that it is not entitled to depose Director Hinman. LBRY cannot make this showing.

LBRY seeks to depose Director Hinman about irrelevant personal statements he made in a speech while working for the Commission about the federal securities laws and digital assets, even though his public statements are readily available and internal discussions about them are both irrelevant and privileged.

This case is about LBRY's offer and sales of its digital asset ("LBRY Credits" or "LBC"), and not about Director Hinman's personal views on the federal securities laws. Director Hinman made clear in his speech that every economic transaction needs to be individually analyzed under the Supreme Court's *Howey* test[1] to assess whether it involves the offer and sale of a security. Director Hinman has never spoken on the Commission's behalf about its application of *Howey* to digital assets, including LBC. Director Hinman's personal views are completely irrelevant to this case, and any internal deliberations he may have had in the course of preparing his speech while working for the Commission are privileged. Specifically:

1. Director Hinman was unaware of the Commission's investigation into LBRY. Hinman Dec., ¶5.
2. Director Hinman left the Commission in December 2020, and first became aware of this case in October 2021. Hinman Dec., ¶¶2, 6.
3. Anything Director Hinman knows about this case he learned during or after October 2021 from the Commission's undersigned counsel. Hinman Dec., ¶8.
4. Director Hinman does not have any first-hand knowledge of the facts underlying this case. Hinman Dec., ¶7. He has also not analyzed LBRY's offer and sale of LBC under the *Howey* test. *Id.*

[1] *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

5. Therefore, Director Hinman is not in a position to form a view on how the *Howey* "investment contract" test applies here. Hinman Dec., ¶12.

Because LBRY cannot show that Director Hinman has discoverable relevant information, it cannot establish the extraordinary circumstances required to depose him. Accordingly, the Court should quash LBRY's subpoena issued to Director Hinman.

BACKGROUND

I. Director Hinman Held a Position of Critical Importance at the Commission.

Director Hinman was a top government official. One of the Commission's most important responsibilities is overseeing the United States capital markets and protecting investors. To accomplish this mission, the Commission, among other things, administers various statutory registration and disclosure requirements under the Securities Act of 1933 ("Securities Act") and Securities Exchange Act of 1934 ("Exchange Act"). Corp. Fin. is one of the Commission's divisions, consisting of approximately 400 staff members. Hinman Dec., ¶3. As the director of Corp. Fin., Director Hinman was "responsible to the Commission for the administration of all matters . . . relating to establishing and requiring adherence to standards of business and financial disclosure with respect to securities being offered for public sale pursuant to the registration requirements of the Securities Act . . . or the exemptions therefrom." *See* 17 C.F.R. § 200.18. Director Hinman served in this position from May 2017 to December 2020. Hinman Dec., ¶2.

Under the director's supervision and management, Corp. Fin. oversees disclosures by issuers in the United States' multi-trillion-dollar capital markets. The Commission estimates that, for fiscal year 2019, registered U.S. public offerings brought in $1.2 trillion in new capital, and exempt offerings accounted for $2.7 trillion of fundraising activities. *See Facilitating*

Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Rel. No. 33-10884 (SEC Nov. 2, 2020) at 202–03 & Table 5, *available at* https://www.sec.gov/rules/final/2020/33-10884.pdf.

Corp. Fin. also assists the Commission in carrying out other mission-critical activities, including advising the Commission on legal and accounting matters under the federal securities laws; recommending new rules or changes to existing rules; and providing informal guidance to companies, investors and their advisors. This guidance may take the form of so-called "no-action letters" stating Corp. Fin's staff's views as to certain legal issues, including whether the offer and sale of an instrument constitutes the offer and sale of a security under the federal securities laws.

Pursuant to its statutory authority, 15 U.S.C. §§ 78d-1(a), 78d-2, the Commission has delegated substantial authority to Corp. Fin.'s director over a number of provisions relating to the registration provisions of the Securities Act and Exchange Act and the exemptions thereto. *See generally* 17 C.F.R. § 200.30-1.

II. Director Hinman's Speech

On June 14, 2018, Director Hinman gave a speech called "Digital Asset Transactions: When Howey Met Gary (Plastic)." *See* Exhibit A, attached hereto (the "Speech"). During the Speech, Director Hinman discussed, generally, *Howey* and its application to digital assets, including a digital asset called "Ether." The Speech was made with an important, and unambiguous, disclaimer: "The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner. This speech expresses the author's views and does not necessarily reflect those of the Commission, the Commissioners or other members of the staff." Ex. A at n.1; Hinman Dec., ¶9.

III. Director Hinman Does Not Have Any Knowledge of This Case.

Director Hinman does not know anything about LBRY, and he does not have any knowledge of the facts underlying this case. Hinman Dec., ¶¶6-8. In fact, he first learned of this case in October 2021. *Id.* at ¶6. Director Hinman never participated directly or indirectly in any offers or sales of LBC, nor has he directly or indirectly observed any offers or sales of LBC. *Id.* at ¶7. And, Director Hinman has not analyzed LBRY's offer and sale of LBC under the *Howey* test, nor has he been retained by any party in an expert capacity to conduct such analysis. *Id.* at ¶¶7, 12.

IV. Procedural History

Despite Director Hinman's lack of knowledge of LBRY, on October 5, 2021, LBRY issued a deposition subpoena to Director Hinman.[2] According to LBRY, "we seek [Director Hinman's] deposition in connection with the supposed standard that the SEC has or has not applied to digital assets under the federal securities laws. Among other things, this is directly relevant to LBRY's fourth affirmative defense that it lacked fair notice of whether its sales of LBC constituted securities or investment contracts." *See* e-mail from LBRY's counsel, attached hereto as Exhibit B. Presumably, the "supposed standard" LBRY's counsel is referring to is the Supreme Court's *Howey* test defining the meaning of "investment contract" in Section 2 of the Securities Act of 1933. The Commission conferred with LBRY, but LBRY declined to withdraw its subpoena.

[2] The Commission takes no position on whether LBRY validly served Director Hinman, but the Commission is moving to quash the subpoena now—which calls for Director Hinman's testimony on November 8, 2021—for the avoidance of any doubt about the Commission's position that LBRY is not entitled to depose Director Hinman.

ARGUMENT

I. Director Hinman is a Top Government Official Protected from Discovery under the *Morgan* Doctrine.

The Court should quash LBRY's subpoena because Director Hinman is protected from being deposed. In *United States v. Morgan*, the Supreme Court strongly discouraged the practice of calling high-ranking government officials as witnesses. 313 U.S. 409, 422 (1941) ("But the short of the business is that the Secretary should never have been subjected to this examination."). The limitations and restrictions on deposing senior government officials have, since *Morgan*, become "well established." *See*, *e.g.*, *Bogan*, 489 F.3d at 423 (upholding protective order preventing deposition of mayor); *Lederman v. N.Y. City Dep't. of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (same for mayor and deputy mayor); *Gomez v. Nashua*, 126 F.R.D. 432, 434 (D.N.H. 1989) ("Federal courts have long recognized a policy against exploratory inquiries into the mental processes of governmental decision makers"); *McNamee v. Massachusetts*, No. 12-40050, 2013 WL 1285483, at *2 (D. Mass. Mar. 25, 2013) (under "*Morgan* doctrine," quashing subpoenas for congressional representative and his deputy) (referred to herein as "*McNamee II*"). "[T]op executive department officials should not, absent extraordinary circumstances, be called to testify or deposed regarding their reasons for taking official action." *Bogan*, 489 F.3d at 423 (collecting circuit court cases).

The rationale for this policy is threefold: (1) the protection of the integrity of the administrative process; (2) permitting high-ranking government officials to perform their official tasks without disruption; and (3) without this protection, good people may be discouraged from entering public service. *See Fed. Deposit Ins. Corp. v. Galan-Alvarez*, No. 1:15-MC-00752, 2015 WL 5602342, at *3–4 (D.D.C. Sept. 4, 2015); *see also Bogan*, 489 F.3d at 423 ("[h]igh ranking government officials have greater duties and time constraints than other witnesses" and

"without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation" (citing *In re United States (Kessler),* 985 F.2d 510, 512 (11th Cir.1993))).

As described above, Director Hinman had supervisory authority and oversight of Corp. Fin.'s numerous staff members and the actions they performed. He is, thus, a senior government official and entitled to protection under *Morgan* and *Bogan*. And while he has completed his term as a director, the rule restricting depositions of high-ranking government officials applies with equal force to former high-ranking officials. *See, e.g., McNamee v. Massachusetts*, No. 12–40050, 2012 WL 1665873, at *2 (D. Mass. May 10, 2012) ("[C]ourts have found that the doctrine applies to former government officials."); *United States v. Wal–Mart Stores,* No. PJM-01-CV-152, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002) (finding subjecting former officials to judicial scrutiny and continued participation in lawsuits years after leaving public office would serve as significant deterrent to qualified candidates for public service).

Faced with the same issue, a court in this circuit recently relied on *Morgan* and *Bogan* to quash subpoenas issued to a then-director of a different Commission division, the Division of Enforcement, and a then-former SEC Commissioner. *See* Exhibit C (Transcript, *SEC v. Navellier & Assocs.*, Inc., No. 1:17-cv-11633 (D. Mass. May 31, 2019) ("*Navellier*"); *see also* Exhibit D, (Transcript at 13, *Navellier*, (D.E. 218) (D. Mass. July 22, 2019)) (denying motion for reconsideration on order quashing deposition subpoenas). This Court should do the same.

II. LBRY Cannot Establish The "Extraordinary Circumstances" Required to Depose Director Hinman.

As set forth further below, LBRY is required to establish extraordinary circumstances to rebut the presumption that LBRY is prohibited from deposing Director Hinman, but LBRY cannot make that necessary showing because Director Hinman (1) does not have any personal knowledge about this case, and, even if he did, (2) the information LBRY seeks—that is,

information purportedly relevant to its fair notice defense—is necessarily only the information that was readily available to LBRY during the period of time relevant to the allegations in the Complaint.

In order to depose a senior government official, LBRY must establish "extraordinary circumstances" that override the *Morgan* doctrine. *Bogan*, 489 F.3d at 423; *McNamee II*, 2013 WL 1285483 at *4. To establish these "extraordinary circumstances," a party must show: (1) that the official has direct personal factual information pertaining to material issues in the litigation, and (2) that the information sought is not available through any other source. *See Bogan*, 489 F.3d at 423 (discovery only permitted where other persons could not provide necessary information); *Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990) (requiring showing that information was not available elsewhere and official had direct personal factual information about material issues); *Alexander v. FBI*, 186 F.R.D. 1, 3-4 (D.D.C. 1998) (staying depositions of White House staff where other avenues of discovery were available). LBRY cannot meet either prong of this two-part test.

A. Director Hinman does not have any personal factual information pertaining to material issues in the litigation.

As set forth above and in Director Hinman's declaration, Director Hinman does not have *any* direct personal factual information pertaining to material issues in the litigation. This fact, in and of itself, demonstrates that the subpoena should be quashed.

LBRY may, nonetheless, argue two points, neither of which suggest Director Hinman has knowledge of material issues in this litigation and are, thus, unavailing.

First, LBRY may argue that Director Hinman's testimony would be relevant to its defense that Section 2 of the Securities Act is unconstitutionally vague because it does not adequately define the term "investment contract" and thus did not provide LBRY with fair

notice. Whether Section 2 of the Securities Act is unconstitutionally vague, however, hinges upon whether the statute provides fair notice to a person of ordinary intelligence. *See Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) ("a regulation may be void for vagueness in violation of due process if in the circumstances it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'" (quoting *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 132 S. Ct. 2307, 2317 (2012))). Indeed, the void-for-vagueness "doctrine's concerns are objective, focusing 'on the basis of the statute itself and the other pertinent law,' without reference to subjective perceptions or individual sensibilities." *Frese v. MacDonald*, 512 F. Supp. 3d 273, 292 (D.N.H. 2021) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1964)). Therefore, whether LBRY had fair notice of the meaning and application of the statutory term "investment contract," must be based on information in the public domain available to a person (or entity) of ordinary intelligence, not undisclosed information from Director Hinman's mind. *See id.*; *see also F.E.R.C. v. Silkman*, 177 F. Supp. 3d. 683, 703 (D. Mass. 2016) ("when applying the void-for-vagueness doctrine outside of the First Amendment context, the relevant inquiry is whether a statute is vague as applied to the particular facts at issue *for a defendant*") (emphasis added) (internal quotations omitted). Ultimately, LBRY's fair notice challenge must be resolved through judicial construction of a statute's meaning, not Director Hinman's testimony on the subject. *See, e.g., Draper*, 827 F.3d at 4 (discussing the manner in which courts consider the statutory language when assessing a fair notice defense). Because Director Hinman's testimony would be irrelevant, LBRY cannot show the extraordinary circumstances needed to depose him.

Second, and notwithstanding the foregoing, LBRY will likely point to a recent decision in *SEC v. Ripple*, No. 1:20-cv-10832 (S.D.N.Y. Dec. 20, 2020), where a judge allowed the

defendant to depose Director Hinman. But, that nonbinding decision is (a) wrong because it failed to recognize (as described above) that the information available to the defendants was the relevant inquiry, not what a former Commission staff member thought about that issue; and (b) in any event, easily distinguished because the allegations in *Ripple* are different.

In *Ripple*, the Commission sued various individuals for aiding and abetting Ripple's unregistered offer and sale of securities in the form of digital assets. One element of proof required in an aiding and abetting case is *scienter*, which puts squarely at issue the state of mind of the defendant. The Ripple defendants asserted that deposing Director Hinman is "critical…as to the specific state of mind and any other potential defenses of the Individual Defendants." Exhibit E, at 3. LBRY has not, and cannot, credibly make a similar argument here. That is because LBRY's state of mind is not an element of the single claim in this case that alleges LBRY violated Section 5 of the Securities Act.[3] *See* Complaint ¶ 44.

In fact, LBRY's request is identical to the defendant's request in *SEC v. Kik Interactive* to depose Director Hinman—a Section 5-only case—which that court rejected. In doing so, the court in *Kik* noted that the void for vagueness affirmative defense—the same defense at issue here, "raises an issue of law, not of fact." *SEC v. Kik Interactive*, 19-cv-5244 (D.E. 30) (S.D.N.Y. Oct. 29, 2019).[4] On a motion for reconsideration, the court in *Kik* further explained that, "[i]f the law is vague, or confusing, or arbitrary, as defendant argues, that can be argued objectively," and admonished the parties not to spend discovery time on "wasteful forays into

[3] There are three elements to a Section 5 claim: (1) no registration statement was filed or is in effect; (2) the defendant directly or indirectly offered to sell the securities; and (3) the offer or sale was made in connection with the use of interstate communications. *See SEC v. Esposito*, 260 F. Supp. 3d 79, 88 (D. Mass. 2017). Scienter is not an element of the offense. *See Esposito*, 260 F. Supp. 3d at 88-89; *SEC v. Gibraltar Glob. Sec, Inc.*, 13-cv-02575, 2016 WL 153090, at *3 (S.D.N.Y. Jan. 12, 2016) ("Section 5 liability does not require scienter.").

[4] The request to depose Director Hinman in *Kik* is legally indistinguishable from the present case, as the central issue in dispute in *Kik* was whether the relevant digital asset was a security.

inadmissible facts."[5] Order Denying Defendant's Motion for Reconsideration, *SEC v. Kik Interactive*, 19-cv-5244, (D.E. 36) (S.D.N.Y. Nov. 12, 2019). The circumstances in this case are the same. LBRY has asserted an objective defense, and the underlying facts (the application of the federal securities to economic transactions) are objectively known to LBRY. Accordingly, LBRY fails to meet its burden and the subpoena should be quashed.

That said, even if LBRY could meet the first part of the test, it would fail on the second part; *i.e.*, that the information sought is not available through any other source.

B. Only information readily available is relevant to LBRY's void for vagueness defense.

As set forth above, Director Hinman's testimony is irrelevant because the relevant inquiry in a void for vagueness defense is whether the securities laws were vague based on information available to LBRY. "[A] regulation may be void for vagueness in violation of due process if in the circumstances it fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Draper*, 827 F.3d at 3 (internal quotations omitted). Whatever Director Hinman might say during some future deposition necessarily has (and had) no impact on LBRY's understanding about whether it may have been legally required to register its offer and

[5] To be sure, LBRY's fair notice defense is invalid and any discovery on it is a waste of time. *SEC v. Kik Interactive Inc.,* 492 F. Supp. 3d 169, 182-83 (S.D.N.Y. 2020) (dismissing defendant's affirmative defense that the term "investment contract" is unconstitutionally vague as applied because *Howey* and its progeny "gives a reasonable opportunity to understand what conduct and devices" the term investment contract covers); *United States v. Zaslavsky*, No. 1:17-cr-00647, 2018 WL 4346339, at *8-9 (E.D.N.Y Sept. 11, 2018) (rejecting defendant's claim that "investment contract" in the definition of security was unconstitutionally vague as applied to digital assets and defendant's specific token) ("the test expounded in *Howey* has – for over 70 years – provided clear guidance to courts and litigants as to the definition of 'investment contract' under the securities laws."); *see also SEC v. Hui Feng*, 935 F.3d 721, 734 n.8 (9th Cir. 2019) (rejecting argument that "security" was unconstitutionally vague because a "word is not vague" when it has a settled legal meaning*); SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052 n. 6 (2d Cir. 1973) (argument that "investment contract" in the Securities Act was void for vagueness was "untenable," "in light of the many Supreme Court decisions defining and applying the term").

sale of LBC. And, to the extent LBRY points to Director Hinman's speech as some evidence of vagueness, that speech is public.[6]

LBRY may, nonetheless, argue that it must depose Director Hinman to access *nonpublic* information that is not available through any other source. LBRY clearly, and improperly, seeks access to this information. *See, e.g.*, Exhibit F (LBRY's First Request for Document Production, No. 17: "All Documents Concerning the June 14, 2018, statements by [Director Hinman] regarding initial coin offerings, including *drafts of* Hinman's speech and *internal Communications*, *analyses, and other materials* that were prepared or relied upon by Hinman" (emphasis added)). But, such nonpublic information is privileged and not subject discovery.

The mental processes of Director Hinman are precisely the type information the *Morgan* Doctrine seeks to protect. *See, e.g., Morgan*, 313 U.S. at 422 ("It was not the function of the court to probe the mental processes of the Secretary."); *Wal-Mart*, 2002 WL 562301, at *1 (high-ranking government officials' "thought processes and discretionary acts will not be subject to later inspection under the spotlight of deposition"). In asking how and why various conclusions were made by Director Hinman in his Speech, LBRY wants to improperly invade Director Hinman's (and his former Commission colleague's) own mental impressions. *See Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing *Morgan*, 313 U.S. at 422) (top executive department officials should not be called to testify regarding their reasons for taking official actions). Because the Speech is public and available to LBRY, it is clear that the

[6] Moreover, the last 80 years of judicial precedent construing the meaning and application of "investment contract" is readily available. The First Circuit's application of the term "investment contract" to "virtual offerings" has been publicly available for more than 20 years. *See SEC v. SG Ltd.*, 265 F.3d 42, 48 (1st Cir. 2001) ("As long as the three-pronged *Howey* test is satisfied, the instrument must be classified as an investment contract . . . Once that has occurred, 'it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value.'" (citations omitted)).

deposition of Director Hinman would be solely to probe the mental processes and strategies of a top Commission official, which are privileged. *See*, *e.g.*, *SEC v. Rosenfeld*, 1997 WL 576021, at *2-3 (S.D.N.Y. Sept. 16, 1997); *SEC v. Morelli*, 143 F.R.D. 42, 46-47 (S.D.N.Y. 1992).

Further, LBRY's Request for the Production of Documents No. 17 demonstrates its intent to ask Director Hinman about the internal communications among the Commission staff that led to his Speech. These communications are protected by the attorney-client privilege and/or the deliberative process privilege. Indeed, to the extent LBRY seeks to question Director Hinman about the Commission's policies regarding digital assets, the Commission's views on Bitcoin and Ether, the relevance of decentralization to prevent digital assets from being viewed as securities, or the preparation of Director Hinman's Speech, these are precisely the types of inquiries that are foreclosed by *Morgan* itself.

There, the Supreme Court said the official "should never have been subjected to [an] examination" about "the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates." *Morgan,* 313 U.S. at 422; *see also SEC v. Comm. on Way & Means of the United States House of Representatives*, 161 F. Supp. 3d 199, 252 (S.D.N.Y. 2015) (explaining that "*Morgan* and its progeny make clear that the 'exceptional circumstances' doctrine is premised on the notion that high-ranking officials should not be required to testify regarding their official decision-making processes"); *Sensor Sys. Support v. FAA*, 851 F. Supp. 2d 321, 329 (D.N.H. 2012) ("[O]pinions and recommendations of agency employees regarding issues addressed in draft documents 'are themselves the essence of the deliberative process' because they represent 'the mental processes of the agency in considering alternative courses of action prior to settling on a final plan.'

Release of those materials would discourage candid discussion within the agency regarding issues that factor into the decision-making calculus.").

Similarly, deposition questions designed to assess whether the Commission (or commissioners) evaluated Director Hinman's Speech—by seeking testimony about Director Hinman's communications with other Commission officials in connection with the Speech, which LBRY's document request shows that it would undoubtedly seek to explore—would improperly intrude on the agency's internal deliberations. Because Director Hinman stated that the Speech "expresses the author's views and does not necessarily reflect those of the Commission, the Commissioners or other members of the staff" and because the Commission has never taken any action to adopt the Speech, questions as to whether the Commission approved the Speech are necessarily questions about the process in which Director Hinman engaged before he made the Speech or about issues Commission officials were debating following the Speech. Any such decision-making processes would be subject to a number of privileges, including the attorney-client privilege and the deliberative process privilege, which "shields from disclosure…deliberations comprising part of a process by which governmental decisions and policies are formulated." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, __ U.S. __, 141 S. Ct. 777, 785 (March 4, 2021) (internal quotation marks omitted). The deliberative process privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8–9 (2001) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, LBRY cannot meet its burden of establishing that extraordinary circumstances justify deposing Director Hinman. Accordingly, the Commission respectfully requests that the Court GRANT its motion and quash the subpoena issued to him.

Dated: November 5, 2021

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION

By its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 5, 2021, I caused true and correct copies of the foregoing to be served on counsel of record for all parties that have appeared to date through the Court's CM/ECF system.

/s/ Eric A. Forni
Eric A. Forni

Exhibit C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. RIPPLE LABS, INC.; BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN, Defendants.	Case No. 20 CV 10832 (AT)

DEPOSITION OF WILLIAM HAROLD HINMAN, JR.

WASHINGTON, D.C.

JULY 27, 2021

REPORTED BY: Tina Alfaro, RPR, CRR, RMR

DIGITAL EVIDENCE GROUP

1730 M Street, NW, Suite 812

Washington, D.C. 20036

(202) 232-0646

Videotaped deposition of WILLIAM HAROLD HINMAN, JR., held at the offices of:

Kellogg Hansen Todd Figel & Frederick
1615 M Street, NW
Washington, D.C. 20036

Taken pursuant to notice before Tina M. Alfaro, a Notary Public within and for the District of Columbia.

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ALSO PRESENT: Stu Alderoty (Ripple Labs)
Deb McCrimmon (Ripple - remote)
David Campbell (videographer)
James Beall (hotseat)

A. Yes.

(Hinman Exhibit 10 was marked for identification.)

BY MR. FIGEL:

Q. Let me show you what I'll ask the court reporter to mark as Exhibit 10, which is EE in the outline. Would you mind handing that to the court reporter?

A. Hand it to the court reporter?

Q. Yes.

Mr. Hinman, I'm confident that you're familiar with this document.

A. I am.

Q. I'll represent to you this is a copy of your June 14th, 2018 speech that was taken off of the SEC Website. You'll see at the top it's entitled "Speech," and it says "Remarks at the Yahoo Finance All Markets Summit: Crypto."

You were the author of this speech?

MR. TENREIRO: Object to form.

A. Yes.

Q. And you were responsible for the content

of this speech?

MR. TENREIRO: I object to form.

A. Yes.

Q. And you prepared this speech as part of your duties as the director of the division of corporate finance, correct?

A. Again, I'm not sure I had a duty to provide a speech, but I did do this speech while I was the director, yes.

Q. You prepared this speech as part of the services you provided to the Securities and Exchange Commission in your capacity as the director of the division of corporate finance, correct?

A. I gave this speech while I was the director of the division of corporation finance.

Q. And you knew that this exhibit, we're now talking about Exhibit 10, the document, was posted on the SEC's Website, correct?

A. Yes.

Q. And you understood -- withdrawn.

And did you understand prior to the time

you delivered this speech that it would be posted on the SEC's Website?

A. I think I did, yes. Normally we would think about that in advance.

Q. Was it your decision to post the speech on the SEC's Website?

A. Yes.

Q. And tell me what the process is by which you made the judgment or the determination to post the speech on the Website.

MR. TENREIRO: I'm going to instruct him not to discuss deliberation with staff or commissioners or their counsel. So you might want to rephrase. I mean, the process by which he made the judgment? I don't know, but go ahead.

A. Do you want to rephrase?

Q. Why don't you try to answer my question.

A. Could you repeat the question?

Q. Sure. I'll rephrase it slightly.

Why did you decide to post Exhibit 10 on the SEC's Website?

MR. TENREIRO: And just, you know, the

same instruction, but go ahead.

A. Typically if I gave a speech while I was the director I would have it posted just to benefit, you know, the folks who wanted to see it who couldn't go to the conference or hear the remarks live.

Q. And what benefit did you think folks who didn't attend the conference would obtain from having access to your speech?

MR. TENREIRO: Same instruction, Mr. Hinman.

A. I think they would be able to see how the division under my leadership was looking at these issues.

Q. And you didn't personally post the speech on the Website, correct?

A. That's right.

Q. There was somebody in the IT department at the SEC who would post it?

A. That's right.

Q. And did you review it before it was posted, this version?

A. I don't know if I reviewed the actual document that was handed over to IT, but I would have looked at -- I've looked at this speech many times before then and my counsel may have been the folks that delivered this to IT.

Q. And presumably you had the opportunity to review your speech prior to your testimony today?

A. Yes.

Q. Are there any statements in Exhibit 10 that you do not believe to be accurate as you sit here today?

MR. TENREIRO: Without disclosing deliberations with the staff that might have occurred after the speech was published on the Website.

A. I don't believe so.

Q. So in other words, if you were releasing the speech today and you were still serving as the director of the division of corporate finance, would you edit this speech in any way before you gave it?

MR. TENREIRO: Object to form.

a whole host of things covered here.

Q. Did you think this -- withdrawn.

Did you believe this speech provided clarity to the market with respect to the application of the federal securities laws to digitalize the transactions?

MR. TENREIRO: So same instruction on deliberative process and also object to form.

A. I think it provided clarity as to how I was looking at these issues.

Q. And did you have an -- withdrawn.

Did you believe that was new information to the marketplace?

MR. TENREIRO: Same instruction.

A. I think how I felt about things or the framework I had in my mind was, you know, not -- wasn't something I had published in a speech earlier.

Q. And what about -- what are the things or the framework that you had in your mind that you communicated in the speech that you had not published or stated earlier?

A. Okay.

Q. Directing your attention to the e-mail you sent to Joe Lubin that's reflected on the page of Exhibit 17 that ends with 1454, do you see "Wrote to Mr. Lubin at 2:06 p.m."?

A. Yes.

Q. Did Chairman Clayton ask you to reach out to Mr. Lubin?

A. Not to my recollection.

Q. All right. Let's go back. I think we were on EE, which is your speech.

A. All right.

Q. All right. Mr. Hinman, I'm directing your attention to Exhibit 10, which is your speech. Your speech included remarks that you included in a declaration in support of Mr. Tenreiro's efforts to quash your deposition in which you stated at paragraph 11 "I began the speech with the following disclaimer. My remarks are mine alone, not necessarily those of the commission, the commissioners, or the staff."

Is that -- I'll represent to you that's

what it says. That was a statement you made under oath, correct?

MR. TENREIRO: Object to form. Go ahead.

A. Yes.

Q. And when you said your remarks were yours alone, what did you mean by that?

A. That these would be my remarks. We as a very standard practice whenever an SEC official speaks provide a statement to that effect.

Q. Well, were these statements your statements alone?

MR. TENREIRO: These statements, Reid?

MR. FIGEL: I'm sorry. In Exhibit 10.

A. The speech reflects my thoughts. I'm comfortable with the speech reflecting my thinking.

Q. But were they your statements in your individual capacity alone?

MR. TENREIRO: Object to form.

A. They are intended to be a speech of my thoughts in the space. Other people may share similar views.

Q. If I could direct your attention to page 4

of 6 of your speech and in particular the second full paragraph on page 4 of 6 beginning with "Promoters and other market participants"; do you see that?

A. Sure.

Q. Could you read the first two sentences?

A. "Promoters and other market participants need to understand whether transactions in a particular digital asset involve the sale of a security. We are happy to help promoters and their counsel work through these issues."

Q. That's it, two sentences. Thank you.

Why did you say that promoters and other market participants need to understand whether transactions in a particular digital asset involve the sale of a security?

MR. TENREIRO: Without disclosing deliberations.

A. I think it's important for promoters, other market participants to understand if they involve the sale of securities so they can comply with the security laws.

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff.

v.

LBRY, INC.,

Defendant.

No. 1:21-cv-00260-PB
February 23, 2022
2:00 p.m.

* * * * * * * * * * * * * * * * * * * *

TRANSCRIPT OF MOTION HEARING AND STATUS CONFERENCE
HELD VIA VIDEOCONFERENCE
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Plaintiff: Peter Moores, Esq.
Securities and Exchange Commission

For the Defendant: Keith Miller, Esq.
Perkins Coie LLP

Timothy John McLaughlin, Esq.
Shaheen & Gordon

Court Reporter: Brenda K. Hancock, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

P R O C E E D I N G S

THE CLERK: This Court is in session and has for consideration a motion hearing and status conference in civil matter 21-cv-260-PB, U.S. Securities and Exchange Commission versus LBRY, Inc.

THE COURT: I've been informed that some members of the public have requested access to this hearing. We've granted those requests. People who are not admitted as parties or counsel need to keep their cameras off and their microphones muted throughout the hearing; and of, of course, it is forbidden to make any recording of this proceeding.

Okay. So, I have a Motion to Quash, I have a Motion to Modify Scheduling Order, and I have a Motion for Protective Order that's not ripe yet that I won't consider, unless the parties jointly ask me to.

Let's start with the Motion to Quash. I'll hear the SEC on that motion.

MR. MOORES: Thank you, your Honor. Peter Moores from the Securities and Exchange Commission. We filed the Motion to Quash the subpoena for the testimony of Director Bill Hinman. We believe that the Morgan Doctrine is what controls here and that Director Hinman is a high-ranking governmental official afforded the protections of the Morgan Doctrine. As such, the sort of burden to take Mr. or Director Hinman's deposition switches over to the defendant here who is seeking the

deposition to establish that extraordinary circumstances are present to warrant the circumstance of taking his deposition. The test under the Morgan Doctrine for whether or not there are exceptional circumstances has been phrased in a couple of different ways, but essentially that the information sought is not obtainable elsewhere and it is personally and uniquely possessed by Director Hinman in this case; and, two, the second prong, is that the information sought is essential, not merely relevant to in this case the LBRY's case.

Many courts actually have a third prong, and, in fact, the Ninth Circuit In Re: U.S. Department of Education, which was cited on February 4th, 2022, has a third prong that there has to be a showing of agency bad faith, and I don't believe that that has been sort of argued here per se, but LBRY in its papers has never suggested or offered that there is agency bad faith and would fail under that third prong of the test. But at least on the papers both parties, I believe, have argued sort of the first and second prong that I identified, and we'll go through that today, your Honor.

As I said, it is LBRY's burden to show these extraordinary circumstances. LBRY has not shown that in its papers. And, first, what LBRY has conceded is that Director Hinman does not possess any knowledge of the case here. He doesn't possess any knowledge about LBRY, doesn't possess any knowledge about LBRY's offer and sales, nor LBC, which is LBRY

credits, token in question.

THE COURT: Let's back up, though, because I do think they challenge your contention that he's a high-ranking government official with a position -- formerly held a position that would qualify for the privilege that you're invoking. I've collected the cases that I can find, and certainly there are cases where a court says this person is a high-ranking official, this person is not a high-ranking official, but what is the principal basis on which I should make the distinction between someone who is sufficiently high ranking to be covered by the privilege?

MR. MOORES: Your Honor, a lot of those cases that I think we've all collected don't articulate a specific test. I think that the case that -- one of the cases that LBRY has cited says it has to be the sort of apex of the agency, but the proof of the cases throughout have shown that it doesn't have to be sort of the highest member of an executive agency, and so I think it ultimately falls back as to the sort of first principles of why the executive privilege or why that protection is afforded, which is essentially that a member of the sort of Executive Branch is not to be hauled into court to testify or to be deposed based upon their decision-making processes. Here we have Director Hinman who is, reports sort of the second highest in terms of he's the head of the division, is in charge of a lot of sort of internal decision

making at the Commission here and advising not only he's also an attorney -- so advising as to policy as well as attorney-client privilege up to the members of the Commission itself. So, I believe that he qualifies in other cases, including the Navellier case that we cited, where it upheld that a division director was a high-ranking governmental official.

THE COURT: Was that issue challenged by the plaintiff in Navellier? I know that the judge applied the privilege and concluded that the official was a high-ranking official, but I didn't see in their evidence that that was a litigated point, a disputed point. Can you help me out on that?

MR. MOORES: So, with respect to whether or not the Morgan Doctrine applied, it was challenged, the Morgan Doctrine specifically applied.

THE COURT: Did they make an argument to the judge that the deponent was not a high-ranking government official under Morgan?

MR. MOORES: My recollection, your Honor, is it at least wasn't sort of foremost in the judge's ruling.

THE COURT: She didn't really explain. I agree she applied it to someone at the same rank as we have here. I just didn't see in her decision that she was evaluating competing claims by the parties and coming down in a particular way on it. So, I think it clearly applies to people like

cabinet-level secretaries, it clearly applies to people like mayors of a city, and it has been widely applied to people who are not at the very top of the agency that they're heading, and I've got examples, and I can draw analogies, but I don't find in any of the case law a detailed discussion of the way in which a judge would go about determining whether someone is or is not a high-ranking official.

The weakness of these kind of categorical approaches to problems are that you don't get to weigh competing considerations and a totality of relevant circumstances sometimes that you would like to be able to do. For example, here it appears that what LBRY wants to do is question the former Director not about any facts about this particular case that that person has knowledge of, because you've proffered that he has no knowledge about this case, was not involved in it, and has nothing to contribute based on personal knowledge about it. Instead, it appears that LBRY is trying to depose this person to gain access to his thought process about how the general issue of how the Howey test applies to digital currencies works, and that seems to be matters of which you would ordinarily not get a deposition for reasons completely unrelated to the Morgan Doctrine. It's the kind of thing that either is simply not calculated to lead to any kind of relevant information at all, or it's protected by the deliberative process privilege. So, I think that's part of the struggle

here.

It is just not apparent to me what this person has to say that could be at all helpful to me in resolving the case, but I did want your thoughts on how I would go about distinguishing between whether someone is a high-ranking official or not. If you've got any other thoughts about it, let me know.

MR. MOORES: Yeah, your Honor. I think that -- first of all, I agree with a lot of what you just said about in terms of the import of what Director Hinman's thoughts are and what LBRY is seeking here, and I do think that there is a relationship between the Morgan Doctrine and sort of deliberative process privilege, which I think you were touching a little bit upon, in terms of seeking the mental decision-making processes of the deponent, and I think that when you have someone who is cloaked with that decision-making authority, which is, I believe, the sort of true import of why LBRY is seeking Director Hinman, himself, they haven't noticed somebody who is sort of lower on the staff or even a sort of, you know, a low member of the staff. They wanted the Director himself, who is cloaked with that authority of decision making on behalf of the Division of Corporation Finance, and so I think sort of the reasons that LBRY is seeking Director Hinman's point of fact that he would be protected under the Morgan Doctrine itself.

THE COURT: Although, the Morgan Doctrine appears to be, rather than the deliberative process privilege, appears to be focused primarily on the need to ensure that high-ranking government officials aren't deluged with deposition requests, because they supervise so many cases and deal with so many issues that they should not be subjected to deposition as a routine matter primarily because of the burden that it inflicts on the person holding the position either as a current officer or former official. So, that seems to be the primary motivation for the doctrine. So, ine one sense, if you were to try to construct a test you would say, well, let's interpret what a high-ranking official is in light of why we have the rule, and we seem to have the rule because someone who is sufficiently high up in a governmental structure can find their lives completely consumed with testifying in depositions of routine cases. I think your argument would be this person oversees hundreds of matters that are potentially the subject of litigation at any one time, and if you do not apply the Morgan Doctrine to someone like this you will overburden the holders of that office both while they currently hold the office and after they complete their government service and move on to other jobs. So, that would seem to be one way of trying to distinguish when someone who is sufficiently high ranking to qualify.

MR. MOORES: Your Honor, I agree. In terms of the

Division of Corporation Finance, it oversees the registration of security offerings that, you know, equate to trillions of dollars and hundreds, if not thousands, of various issuers. So, to the extent that there was ever a decision on the registration that would involve Director Hinman, just with respect to digital assets this is the third case in which Director Hinman has been at least noticed, if not more, and I'm just basing this upon when there have been motions to quash in the Kik case, which we cited in our briefs, and the Ripple matter, which I'm sure you're going to hear at least about from LBRY. So, this is the third time in which he's been hauled in to testify as to his internal decision-making process with respect to digital assets and --

THE COURT: One of the concerns, potential concerns, about extending the doctrine too far down into an organization is that you're unnecessarily insulating people from having to provide information about things that might be very important to a particular litigant. Say, for example, a person holding the Director's position is a witness to allegations of sexual harassment in the workplace. That would be a case in which the availability of that person for deposition would be highly important notwithstanding his or her high position in government, but the way the privilege works, the Morgan Doctrine works under those circumstances it would be relatively easy for someone in LBRY's position to demonstrate that the

Director, although holding a high-ranking position, should not be immune from having to cooperate because they have direct personal knowledge and they are uniquely positioned to contribute in an important way to the case, not simply because they're high up in a chain, where the actual work is being done by people many levels below. That's something that suggests to me that we don't need to be, in determining what is high enough for the Morgan Doctrine to apply, we don't need to be overly concerned that will insulate people from being accountable for their actions to the extent there's some reason to believe that the person has engaged in conduct that might implicate them in some kind of civil liability, or that they're a witness to conduct. Then, even if the Morgan Doctrine applied, it would fit within the exception.

MR. MOORES: Yes, your Honor. I believe the hypothetical you provided does not really touch upon a lot of the main primary concerns of the Morgan Doctrine. You know, if it's an issue of sexual assault, that seems potentially a more of a one-off situation that wouldn't overburden the governmental official as well as something that's, you know, within their knowledge as a potentially percipient witness and does not go to their sort of decision-making in their official duties.

THE COURT: And if there is an allegation, say, that someone at the director level harbored a particular bias and

participated in decisions in a way that potentially provided the target of the decision with a defense, say there was a selective enforcement claim that survived, I've said the selective enforcement defense doesn't survive here, one could say that there's a general Morgan Doctrine applicability; but where the subjective mental state of the Director bears directly on a viable defense, that would be a case where you would find an exception to the Morgan Doctrine.

MR. MOORES: Right, which I think is why you find, if you read the Ninth Circuit's recent opinion and some of the other court opinions that impose the bad-faith prong to the sort of exceptional -- to whether or not the Morgan Doctrine would apply or not, if there is a colorable argument of bad faith, as you're suggesting, with the selective enforcement claim, then that would fall outside of the Morgan Doctrine potentially or at least it would be an exceptional -- extraordinary circumstance which would fall out of the protection of the Morgan Doctrine.

THE COURT: All right. What else did you want to say in support of your argument?

MR. MOORES: Thank you, your Honor. So, with respect to the prong of whether or not the information is otherwise available, this is not something that LBRY, who, again, has the burden to establish is under the Morgan Doctrine, has really put forth in their papers. If we look at some of the topics

that they believe that Dr. Hinman, sorry, Director Hinman would be testifying about, the perception in the marketplace, so if this is what the marketplace was thinking, then that clearly would be available from another source other than Director Hinman. And then the other sort of topics that they've identified, which is the Commission's application of the Howey test, or the Commission's approach in response to market participants, or the status of the Commission's adoption, these are not necessarily topics that are limited to Director Hinman, and, again, if subject to discovery, then they could be achieved in other ways than taking Director Hinman's testimony. So, that would just, that prong alone LBRY fails in its effort to take Director Hinman's testimony.

But more importantly I think, perhaps, is just whether or not it is indeed relevant to this case, and as the standard is, it's not just mere relevance. It actually has to be essential to the defense's argument here, LBRY's argument, and primarily they're offering or they're proffering it that Director Hinman's testimony would be somehow relevant to their fair notice defense for --

THE COURT: I think I've got your argument on that, and my initial reaction is that argument is persuasive, that fair notice defenses really turn on objective evaluations of the available information and not the subjective understandings of the people who are enforcing or promulgating the doctrine

that's being challenged. So, I understand you make that argument. At least my preliminary assessment is that argument is persuasive with me, so I don't need to hear you say more, unless you feel you need to.

MR. MOORES: No, your Honor. The one thing I would note sort of interestingly is LBRY is putting a lot of focus on Director Hinman's speech and believes that it somehow supports their position that the Howey test is too vague as applied to at least LBRY's offer and sales. But Director Hinman throughout his speech in 2018 upholds the Howey test. He's simply applying the Howey test, and the references that he makes to the Howey test are essentially just quoting the prongs of it, where he might say if a promoter does not satisfy prong two, then it's not an investment contract, or if it doesn't satisfy prong three, then it's not an investment contract. So, in any sort of way it doesn't sort of make logical sense that the speech in and of itself would be evidence that the Howey test is too vague, because Director Hinman himself is saying that the Howey test is what controls and, you know, the application of it is the facts and circumstances of the situation.

So, the last point I would make, your Honor, is really just the notion that, even if it was relevant, what they're ultimately seeking, what LBRY is ultimately seeking is stuff that is protected by the deliberative process privilege or the

attorney-client privilege. As I mentioned beforehand, Director Hinman is an attorney, and in his role he would be providing advice to the Commission or the Commissioners, and in terms of developing policy, internal discussions about how that Howey test would apply, the deliberative process privilege would also apply. So, in terms of how --

THE COURT: I think you may be right on that, but if that were all we were dealing with my inclination would be to say you should have the deposition and you object and instruct not to answer, and then the Court can evaluate on a question-by-question basis claims of a deliberative process.

The basic problem for me is I haven't seen anything in LBRY's requests that gives me any encouragement that he has anything to say that would be relevant. I understand your point is that the test here, to the extent the doctrine applies, is much more than mere relevance, but I'm just not seeing what he has to say that's useful at all in this litigation, and so that would be a basis on which to potentially quash a deposition subpoena. If it was just, well, he's got things to say that are protected by the attorney-client or deliberative process privilege, my view is, well, let's see what he says in a deposition and you instruct him not to answer on those questions where there's a potential privilege, and then I evaluate those on a motion to compel. Something like that's the way I would ordinarily do it.

MR. MOORES: I would agree, your Honor. I was just suggesting that under this Morgan Doctrine specifically, and I think you were talking a little bit perhaps outside the Morgan Doctrine just on relevance, but within the construct of the Morgan Doctrine, where LBRY has to establish extraordinary circumstances, ultimately what they're seeking is not available from Director Hinman due to the privileges, and that sort of guts their argument that it is actually relevant or satisfies the extraordinary circumstance.

THE COURT: Your point is to the extent they want to get from him, Tell us what you guys were talking about inside the agency when you were formulating your policies about what would qualify as an investment contract under Howey, your view is that's deliberative process and/or attorney-client, and he would never get it anyway, so he can't satisfy the extraordinary circumstances exception based on that. Okay. I understand your argument.

MR. MOORES: Right. And then, lastly, I know that LBRY has suggested that Director Hinman's testimony would be relevant to its sort of defense in chief, which is just that the offer and sales do not satisfy the Howey test itself, but it doesn't seem that Director Hinman --

THE COURT: No offense to him, but that's my job here, not his. What he says when he speaks as a private citizen, what he says when he gives speeches, my reaction is I could

care less. I mean, that's not something that's entitled to deference under any doctrine that I'm aware of, and in the end of the day I'll make the decision whether the SEC has a viable claim here or not. So, I don't think what he has to say about how he thinks the doctrine works matters at all. Does it? I mean, how does it -- I don't defer to government employees giving speeches on their own dime talking about the way they think the law works. I'm not giving any deference to that. Am I right about that? Do you understand my concern?

MR. MOORES: I do, and I think you are right, your Honor, that the deference is to the precedent and the controlling case law, not to director --

THE COURT: And any regulations or actions that are taken under doctrines like Chevron or similar doctrines in which, when the agency speaks in ways that entitle it to deference, then, of course, the Court would grant deference, but the Court doesn't give deference to agency employees, even high-ranking ones, when they try to say to people what they think the law is. That doesn't get any deference, and so it wouldn't affect my decision making one way or the other.

MR. MOORES: So, your Honor, subject to your questions or rebuttal to what LBRY has to argue, I'll cede the floor.

THE COURT: Okay. Let me see what LBRY has to say.

Go ahead, Counsel.

MR. MILLER: Good afternoon, your Honor. My name is

Keith Miller. I represent LBRY, Inc. I'm a partner at Perkins Coie.

Your Honor, I thought you made a good observation regarding the rationale for the doctrine, and I'd like to elaborate a little bit further on it. First, as I understand, the rationale for the rule is twofold. One is to prevent a chilling effect, if you will, on senior official government officials so that they do not -- their discussions amongst members of the agency are not chilled because of a threat of being deposed. The second rationale, as you stated, is the need to ensure that an official, because of his title, he's not engaged in litigation depositions because of his title.

So, with that rationale I would argue, your Honor, we need to look at what we're trying to get from Mr. Hinman. First of all, we're trying to obtain as a private citizen -- as he said, These are my personal statements -- what he believed was relevant in making determination under Howey whether a digital asset is a security. It's his speech that we're asking to depose him about, not what did the other staff members talk to you about about digital assets. That's not what we're here to ask Mr. Hinman about. We're here -- he made a speech where he drew conclusions as a personal individual. We believe it is very dispositive on the issue of fair notice.

If the Director of -- I'm sorry. If the Director of Corporate Finance has a theory about what the industry does

know and what the industry doesn't know, that's important because it provides a standard. If the entire industry, and we will be presenting evidence at trial on this, if the entire industry doesn't know if a digital asset under these types of circumstances is an investment contract under Howey, okay, that is relevant to evidence at trial to prove that they didn't have fair notice.

THE COURT: So, if he thought -- if a person in his position gave a deposition in this case and took the position that he subjectively thought that LBRY's offerings were registrable securities offerings, that's a fact that I could take into account in deciding whether your client is liable or not? That seems really weird to me. We want to make decisions about whether your client is liable based on the law, not based on what random private citizens think about it.

MR. MILLER: It goes to fair notice, your Honor, what in our papers we've shown. We have Mr. Hinman talking about two digital assets, Bitcoin and Ether, and he concludes that they are not securities, and he also concludes that at some point in time, and his speech is clear on this, and it's also cited by Chairman Clayton in his letter to Congress, that securities that are initially securities can morph if the efforts of others are no longer there. So, we think, and there's never been any communication by the SEC about what are those factors, like when is something a security in the

beginning and then morphs into a non-security? And so, we've raised that as a defense here. In our answer we said, even if it was at some point in time and it is no longer a security because the efforts of others are ministerial, and so, if Hinman were to testify, I went through this process in writing my article and in connection with that I met with industry leaders, I met with lots of different attorneys, and that was the impetus of writing this speech, I think that goes to show or support our argument of fair notice, that there really wasn't fair notice here.

THE COURT: Let's assume that you're right, at least insofar as it bears on your fair notice defense, what Hinman actually publicly says, but that's not what you're seeking to obtain in this deposition, because you already have what he publicly says.

MR. MILLER: Right.

THE COURT: You're trying to get at things he hasn't publicly said but that you think are useful in understanding his thought process. I don't see how that has any bearing on your fair notice defense.

MR. MILLER: Well, we would ask him, What was the rationale for your speech? Why did you put it out? What were your communications with third parties in connection with your speech? What was your application at the time -- how did you apply Howey to Bitcoin and Ether? You know, I think those are

the things that we would explore to try to figure out whether our fair notice defense has further evidence that can be demonstrated at the trial.

THE COURT: Okay. Well, look, I think that's helpful to me, because it does -- you're being frank with me about the kinds of things you want, which I appreciate. It helps me evaluate your request. But I do understand you to be saying that we really want to know what led into his speech, what his thinking was, who he was talking to, what input he was getting for it, because we think that bears on our fair notice defense. That's primarily what you want to talk to him about. Is that fair to say?

MR. MILLER: That's fair to say, and that's, frankly, consistent in how the Court in the Ripple case has approached this, and that is allow Hinman's deposition to occur and to allow limited discovery regarding --

THE COURT: In that Ripple case I'm remembering, if I've got it wrong, you'll tell me, wasn't there an aiding and abetting allegation in that case, and didn't the Court specifically have to be concerned with the subjective mental state of the deponent to evaluate a claim? Much in the nature of before I precluded it you asserted a selective enforcement defense and a kind of bad-faith argument on the part of decision makers, if I allowed that defense this case would look more like Ripple, but it isn't really a Ripple case as it

currently is postured. So, isn't that a way to distinguish Ripple? I think the government makes that point.

MR. MILLER: They do, and in our response, your Honor, we demonstrate why the Court's opinion wasn't solely focused on the aiding and abetting. Ripple and the individuals brought the motion. And so, yes, the Court did mention that the individuals have to substantiate a knowledge prong for aiding and abetting, but it was also for the benefit of Ripple. It wasn't just, Okay, individuals, you can take the deposition, and I think we mention that in our brief at pages 12 and 13.

THE COURT: So, you argue that, but what about Judge Bowler's decision in Navellier? She reached the conclusion that the Morgan Doctrine did apply and protect someone at the very same level. You just say she got it wrong on this one and I should --

MR. MILLER: I think that case, if I remember it correctly, your Honor, I believe that the depositions did take place, but, again, the deliberative process privilege was invoked at the deposition. It wasn't a blanket, absolute prohibition, unless I'm mixing that case --

THE COURT: I may have misunderstood that. Let me ask the government. Just tell me. You're the one that cited Navellier. Is that right, the depositions already took place and it's just a selective -- because that wouldn't make sense to me. That would be a deliberative process privilege, not a

Morgan Doctrine problem.

MR. MOORES: Your Honor, I'll double check on this, but it's my understanding that those depositions did not go forward. It was a former Commissioner and it was the Director of Enforcement. My understanding is that neither of those went forward.

THE COURT: Yeah, the Morgan Doctrine is designed to prevent the deposition entirely, not to prevent selective -- to protect certain answers once the deposition is underway. That's really more deliberative-process privilege kind of issues. If you allow the deposition, the ordinary rules govern how the deposition takes place. That's the way I thought the Morgan Doctrine worked. Okay. So, you'll both check on that and let me know if you come up with anything, and I'll go back over it, but I didn't recollect that the depositions, in fact, occurred. There were other depositions, but those depositions I don't think did occur.

Okay. So, Counsel, can you help me out on this? What do you think is the way to distinguish a high-ranking official from a non-high-ranking official for purposes of the doctrine?

MR. MILLER: I think you need to go back to the rationale again, which is the need to ensure that an official in his official capacity isn't being burdened. Mr. Hinman is no longer an official. So, that argument I think is much more supportive of our argument.

THE COURT: I do think it's a relevant factor in determining if they are a high-ranking official potentially able to invoke the Morgan Doctrine whether there should be an exception. I think it's a factor but not determinative. That's how I process it. Do you agree or disagree?

MR. MILLER: Yeah, I agree. I do agree. And we also say in terms of looking at, as you said, there are cases on both sides where a mayor is clearly, you know, a top-ranking official and when there's other deputies, things like that, depending on the agency. So, we need to look at the SEC. The SEC is run by the Chairman and four Commissioners. We're not asking for their depositions. Underneath are five Division Directors and 25 other offices that report to the office of the Chairman. You've got Chief Accountant's office, you have Head of Public Affairs, you have legislation and inter-government affairs, you have the various divisions, Enforcement, things like that. Our position would be in this context Mr. Hinman is not a high-ranking official because he's not at the apex of the decision making. And so, a lot of these cases talk about the apex, and I've been trying to figure out what is apex, what isn't, and I think it comes down to can they make the ultimate decision.

THE COURT: Well, if you believe in the unitary executive theory, there's only one person at the apex of the Federal Government, and that's the President of the United

States. So, it clearly doesn't mean that, because it applies to a secretary, it applies to cabinet secretaries, and it would clearly apply to the SEC Commissioners and the Chair of the Commission. The question is does it ever apply below that level in an organization like the SEC, and I don't think there's been a well-reasoned decision that I've seen that helps inform how a court should go about undertaking that analysis, so what we're left with are a bunch of analogies where the court applied it this way and the other court applied it that way.

What I'm inclined to do is to say that we should evaluate high ranking not in any kind of absolutist or categorical way; we should really look at what the functions of the office are, and if those functions are such that that person is likely to be involved in highly voluminous, complex, discretionary decision making, where the person exercises a policy formulation role and isn't simply executing policies established at lower levels, that you probably ought to think of that person as high ranking because, given the exposure that that person has to potential litigation, the burdens on the office could be extraordinary, as opposed to, say, a line SEC attorney, like the one that's currently arguing in front of me, who's not a high-ranking official, but when you go sufficiently up the policy chain that that person is effectively a manager of a big portfolio where hundreds and thousands of decisions

are being made by subordinates and reviewed that that person is sufficiently high ranking to potentially qualify.

And then, in my mind, we should police the extraordinary circumstances exception reasonably to allow exceptions like the one I proposed, where someone has direct personal knowledge of a matter that isn't part of his management portfolio where he's indirectly supervising a bunch of stuff but he, in fact, or she, in fact, witnessed something if it happened in the office that gives rise to potential liability. Then you would easily find the exception satisfied, because that person has unique and very important information as opposed to information that is largely derivative about policymaking or execution of policy.

So, that's how I'm inclined to look at it, and anything else you want to say on that subject go ahead, and then make any other points you want to make on the particular issue.

MR. MILLER: Just a final point is, again, I think the Court should view this as an individual, yes, he was at an agency, but expressed an opinion, their personal opinion, and for that reason I think the exceptions to Morgan, the Morgan Doctrine, apply, and the rationale for the Morgan Doctrine would not apply in this situation.

THE COURT: All right. Thank you. I appreciate the argument on it.

So, in preparation for the hearing today I carefully reviewed the Supreme Court's decision in Morgan. I read the First Circuit's decision in Bogan against the City of Boston reported at 489 F.3d 417, a 2017 First Circuit decision, which is, of course, controlling precedent in my case.

I tried to look at how other courts dealt with the issue of whether someone is a high-ranking official or not, and, as I have suggested to you, I don't think there are an abundance of well-reasoned decisions, certainly nothing that's controlling on me. Let me just identify a couple of examples that I think are somewhat helpful, although the reasoning provided is very limited.

I did look at the case of RI, Inc. against Gardner, which is reported at 2011 Westlaw 4974834, an Eastern District of New York decision from 2011 that held that the Solicitor General of the United States Department of Labor was a sufficiently high-ranking official to qualify under the Morgan Doctrine.

I looked at a decision from the District of New Jersey, U.S. against Sensient, S-e-n-s-i-e-n-t Colors, Inc., reported at 649 F.Supp. 2d 309, a 2009 District of New Jersey decision, where the Court held that an EPA regional administrator was a high-ranking government official.

And I looked at a decision from the District Court of the District of Columbia, Low against Whitman, reported at 207

F.R.D. 9, where the Court concluded that the EPA's Deputy Chief of Staff did qualify as a sufficiently high-ranking person.

Finally, I looked at, again, a District of -- Columbia District Court decision, Sourgoutsis, S-o-u-r-g-o-u-t-s-i-s, against United States Capitol Police, 323 F.R.D. 100, a 2017 District of Columbia District Court decision where the Court held that the Inspector General of the United States Capitol Police was a high-ranking official for the purpose of the Morgan Doctrine.

As I said, my inclination, in the absence of more specific guidance from the First Circuit or the Supreme Court, is to suggest that in determining whether someone's a high-ranking official you shouldn't look at a simple categorical approach of are they the highest ranking official in their agency. Rather, I think you should look at it functionally, and do they perform functions that involve supervision of a large number of subordinate employees that are responsible for carrying out the day-to-day operations of that particular governmental agency, whether they are involved in overseeing substantial amounts of government activity that could potentially expose them to hundreds of thousands of lawsuits if they were routinely subject to deposition, and judged by that standard -- and I do believe, as I said, that the Navellier case that I've previously cited supports this.

I do believe that potentially that the former Director

does qualify as a high official. The fact that he's a former official is a factor to consider but isn't dispositive, because, again, we don't want people who take these positions when they do leave office to spend the rest of their life taking depositions, responding to efforts to establish whatever it is that the litigant wants to establish. So, I do think that this former Director does have a position that potentially qualifies him under the Morgan Doctrine for protection against deposition.

What's really important to me here, though, is I just do not understand how the former Director has anything to contribute here. And I respect Mr. Miller's argument, and I appreciate his frankness. I don't think that questions about what drove him to make the speech, who he communicated with when he made the speech, what his internal thought process was, or who he may have been deliberating with while formulating his views on this matter come anywhere close to satisfying an extraordinary circumstance test. To the extent he wants to use the testimony to convince me that it was widely understood in the marketplace that there was a particular view about how the Howey test applies, that could be established from people other than the former Director. One could imagine an expert witness that might testify about that, one could imagine people engaged in the industry that might be able to testify about that, and I don't believe that that information would be uniquely available

from the former Director.

More fundamentally, I just don't see how that information has any potential relevance to the proceeding. The way I'm seeing it, the primary defenses here are this just doesn't qualify under Howey, it's not an investment contract, the SEC can't prove its case, and, in any event, we have a viable fair notice defense. Both of those issues turn on objective facts, the Director has no personal knowledge of the particulars of this case, and in my view the fair notice defense really turns on objective criteria, not subjective thought process of the individual involved, and I do agree that it's likely that, to the extent one wants to get into that, it's hard for me to see how it isn't protected by the deliberative process privilege, and so it wouldn't be available, in any event. So, I don't believe that the exceptional circumstances test comes anywhere close to being satisfied here.

So, for those reasons and the additional reasons set forth in the SEC's supporting memorandum I'm going to grant the Motion for Protective Order and bar the deposition of the former Director.

Does anybody need me to make any additional findings or rulings with respect to that particular issue?

Is there anything else from the SEC that you feel I need to take up that I haven't taken up?

MR. MOORES: Not as to that motion, your Honor.

THE COURT: All right. Mr. Miller, anything else? Your objections are all preserved, of course, for purposes of appeal. Is there anything else you need me to take up that I haven't taken up on that particular --

MR. MILLER: No, your Honor.

THE COURT: All right. So, let's turn to the next matter, which is a proposal by the SEC to delay the scheduling of this case.

Counsel, one thing that has really resonated with me in this case is that LBRY feels extremely burdened by this litigation. Now, you make arguments that everything you've done is appropriate and the discovery requests to date have not been overly burdensome, but this is a company that is clearly not in great financial circumstances. This has a big bearing on their efforts to survive. This has been going on for years. To the extent they oppose delays, I want to try to keep this matter moving. On the other hand, your point is you think that they have -- if I'm understanding your position correctly, your position is that LBRY, without making it clear to you initially, has arbitrarily drawn a self-imposed line on what discovery they're going to produce and that they're not -- they haven't produced anything post filing of the complaint. Am I overstating your position, or is that your position?

MR. MOORES: Your Honor, there's a lot that's true.